FILED

MAR 05 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY J. BURTON, Petitioner - Appellant, v. PEOPLE OF STATE OF CALIFORNIA; et al., Respondents - Appellees.	No. 06-17072 D.C. No. CV-02-00675-LKK MEMORANDUM [*]

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Submitted February 18, 2009[**]

Before: BEEZER, FERNANDEZ, and W. FLETCHER, Circuit Judges.

Terry J. Burton, a California state prisoner, appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

DRS/Research

jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Burton contends that the district court erred by finding that his claim that trial counsel rendered ineffective assistance, and his claim that the state courts denied his motion for DNA testing in violation of due process, are time-barred pursuant to 28 U.S.C. § 2244(d)(1). The record discloses that, after exhausting these claims in the California Supreme Court, Burton did not file an amended federal petition in district court until after the limitations period expired. The claims are therefore untimely, even if Burton were entitled to statutory tolling for the entire time during which he alleges that an "application for State post-conviction or other collateral review" was pending. 28 U.S.C. § 2244(d)(2). Furthermore, because the claims in the amended petition are "supported by facts that differ in time and type" from those in the original petition, the amended petition does not relate back to the original, timely-filed petition. *Mayle v. Felix*, 545 U.S. 644, 650 (2005). We conclude that the district court did not err by dismissing these claims as time-barred.

Burton also contends that the trial court erred by admitting a statement he made to police while in custody, without having been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The state court determined that *Miranda* was not implicated, because Burton's statement was not made in

response to express questioning, or in response to words or actions that police should have known were reasonably likely to elicit an incriminating response. We conclude that the state court's decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1); *see also Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980).

Burton's request for appointment of counsel is denied.

AFFIRMED.